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7           UNITED STATES DISTRICT COURT  
8           WESTERN DISTRICT OF WASHINGTON  
9           AT SEATTLE

10 MICROSOFT CORPORATION,

11                 Plaintiff,

12                 v.

13 MOTOROLA, INC, et al.,

14                 Defendants.

15           MOTOROLA MOBILITY, INC., et  
16           al.,

17                 Plaintiffs,

18                 v.

19           MICROSOFT CORPORATION,

20                 Defendant.

CASE NO. C10-1823JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTIONS TO SEAL

## I. INTRODUCTION

This matter comes before the court on numerous motions to seal trial exhibits which have been filed by both Plaintiff Microsoft Corporation (“Microsoft”) and Defendants Motorola, Inc., Motorola Mobility, Inc., and General Instrument Corporation’s (collectively, “Motorola”), as well as a number of non-parties. (See Microsoft Mot. (Dkt. # 510); Motorola Mot. (Dkt. # 495); Dkt. ## 498, 502, 519, 522, 543, 555, and 562). For the reasons set forth below, the court GRANTS in part and DENIES in part the motions.

## **II.      LEGAL STANDARD**

Historically, courts have recognized a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978). “Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). In order to overcome this strong presumption, a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the public policies favoring disclosure. See *Kamakana* at 1178-79. Because the public’s interest in non-dispositive motions is relatively low, a party seeking to seal a document attached to a non-dispositive motion need only demonstrate “good cause.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)

1 Conversely, “the resolution of a dispute on the merits, whether by trial or  
2 summary judgment, is at the heart of the interest in ensuring the ‘public’s understanding  
3 of the judicial process and of significant public events.’” *Kamakana*, 447 F.3d at 1179  
4 (quoting *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289,  
5 1294 (9th Cir. 1986)). Thus, a party seeking to seal a judicial record attached to a  
6 dispositive motion or presented at trial must articulate “compelling reasons” in favor of  
7 sealing. See *Kamakana* at 1178. Consistent with the foregoing, Western District of  
8 Washington Local Rule CR 5(g)(2) provides that the court may, for “good cause under  
9 [Federal Rule of Civil Procedure] 26(c),” seal a document attached to a nondispositive  
10 motion, or seal a document attached to a dispositive motion or trial exhibit upon a  
11 “compelling showing that the public’s right of access is outweighed by the interests of the  
12 public and the parties in protecting the court’s files from public review.” Local Rules  
13 W.D. Wash. CR 5(g)(2).

14 “The mere fact that the production of records may lead to a litigant’s  
15 embarrassment, incrimination, or exposure to further litigation will not, without more,  
16 compel the court to seal its records.” *Kamakana* at 1178 (citing *Foltz*, 331 F.3d at 1136).  
17 “In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a  
18 vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.”  
19 *Id.* at 1179 (citing *Nixon*, 435 U.S. at 598). The Ninth Circuit has adopted the  
20 Restatements’ definition of “trade secret” for purposes of sealing, holding that “[a] ‘trade  
21 secret may consist of any formula, pattern, device or compilation of information which is  
22 used in one’s business, and which gives him an opportunity to obtain an advantage over

1 competitors who do not know or use it.” *In re Electronic Arts*, 298 Fed. App’x 568, 569-  
2 70 (9th Cir. 2008) (quoting Restatement of Torts § 757, cmt. b). Additionally,  
3 “compelling reasons” may exist if sealing is required to prevent judicial documents from  
4 being used “as sources of business information that might harm a litigant’s competitive  
5 standing.” *Id.* at 569 (9th Cir. 2008) (citing *Nixon*, 435 U.S. at 598).

6 **III. THE MOTIONS TO SEAL BEFORE THE COURT**

7 The parties have been advised that pursuant to Ninth Circuit law, there will be a  
8 strong presumption that documents will be publicly available, *see Kamakana*, 447 F.3d at  
9 1178, and that any motions seeking to overcome this presumption must be narrowly  
10 tailored. With these requirements in mind, the court now considers each of the motions  
11 to seal before it.

12 **A. Microsoft’s Motion to Seal Trial Exhibits**

13 Microsoft’s motion to seal trial exhibits asks the court to seal six categories of  
14 information: (1) confidential patent license agreements; (2) strategic product planning  
15 documents; (3) confidential source code; (4) proprietary technical product specifications;  
16 (5) confidential financial information; and (6) confidential settlement negotiations.  
17 (Microsoft Mot. at 5.) Microsoft has provided the court with a list of trial exhibits that it  
18 seeks to seal and a copy of the individual exhibit. Having reviewed the exhibits, the court  
19 sets forth general guidelines for the categories of documents that Microsoft seeks to seal  
20 and rules on individual exhibits contained in Microsoft’s list. As explained below, at trial  
21 the court will apply these general guidelines in determining whether to seal a document  
22

1 and in determining whether to close the courtroom for purposes of testimony related to  
2 such documents.

3       **1. Confidential Source Code, Confidential Settlement Negotiations &**  
4       **Technical Product Specifications**

5 Microsoft seeks to seal documents that it submits contain confidential source code,  
6 settlement negotiations, and product specifications. The court agrees with Microsoft that  
7 these categories of documents contain sufficiently confidential information to outweigh  
8 the public's interest in access to public records. Thus, the court will seal trial exhibits  
9 properly falling under any of these three categories.

10       “[S]ource code is undoubtably[sic] a trade secret.” *Agency Solutions.Com, LLC v.*  
11 *TriZetto Group, Inc.*, 819 F.Supp.2d 1001, 1017 (E.D. Cal. 2011). Moreover, the  
12 impending trial has little to do with the contents of Microsoft’s source code, but instead is  
13 solely about determining a reasonable and non-discriminatory (“RAND”) royalty rate and  
14 range for Motorola’s 802.11 and H.264 standard essential patent portfolios. Thus, for  
15 purposes of understanding the court’s final adjudication of the issue-at-hand, the public  
16 need not understand Microsoft’s proprietary source code.

17       The court views settlement negotiations between Microsoft and Motorola related  
18 to Motorola’s standard essential patent portfolios in a similar light. As the court  
19 explained in its order on the parties’ motions in limine, the purpose of Federal Rule of  
20 Evidence 408 is to encourage the compromise and settlement of existing disputes. *See*  
21 *Josephs v. Pac. Bell*, 443 F.3d 1050, 1064 (9th Cir. 2006). “By preventing settlement  
22 negotiations from being admitted as evidence, full and open disclosure is encouraged,

1 thereby furthering the policy toward settlement.” *United States v. Contra Costa Cnty.*  
2 *Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982). Again, in this trial, the court will determine  
3 the value of Motorola’s patent portfolios, which will have little relevance to what the  
4 parties discussed behind closed doors during settlement. Accordingly, the court  
5 concludes that the importance of encouraging frank settlement negotiations outweighs the  
6 public’s interest in knowing what was discussed in those settlement negotiations.

7 Finally, Microsoft asserts that at trial the parties may introduce technical  
8 information related to the design and operation of the chips included in Microsoft’s Xbox  
9 product. (Microsoft Mot. at 13.) Such chips are supplied to Microsoft by a non-party  
10 company that considers the design and operation of these chips confidential and  
11 proprietary. Indeed, this non-party company only provides access to its technical  
12 information through non-disclosure agreements. Moreover, similar to source code and  
13 settlement negotiations, the design and operation of such chips play little role in the  
14 court’s determination of the value of Motorola’s patent portfolio because such a  
15 determination will be focused on Motorola’s patent relevant portfolios and their  
16 importance to Microsoft. Thus, the court will seal documents related to such technical  
17 information.

18 Based on the foregoing, the court seals documents properly categorized as  
19 confidential source code, settlement negotiations between Microsoft and Motorola, and  
20 non-party technical information. Having reviewed the trial exhibits submitted by  
21 Microsoft relevant to these categories, the court seals trial exhibits 84, 288, 524, 504,  
22 541, 542, 1476, 2333, 2334, 2335, 2336, 2337, 2338, 2339, and 2340. Moreover, during

1 testimony related to confidential source code, settlement negotiations, and technical  
2 information, the court will close the courtroom to unauthorized persons.

3 **2. Confidential Patent License Agreements**

4 Microsoft seeks to seal five licensing agreements that it has entered into with  
5 various non-parties. It argues that disclosing the terms of these licensing agreements will  
6 put it at a disadvantage in negotiations for future licensing deals. (Microsoft Mot. at 8-9.)  
7 Although pricing terms, royalty rates, and minimum payment terms of the licensing  
8 agreements are certainly proprietary in nature, *see In re Electronic Arts, Inc.*, 298  
9 Fed.Appx. 568, 569 (9th Cir. 2008), here the court must balance Microsoft's interest in  
10 such proprietary information against the importance of the public access. Based on the  
11 parties' *Daubert* motions and motions in limine, the court understands that Microsoft and  
12 Motorola seek to introduce such licensing agreements as evidence of a proper royalty rate  
13 for Motorola's standard essential patent portfolios. Thus, these licensing agreements are  
14 at the very center of the issue to be decided at trial and may provide, at least in part, the  
15 basis for the court's final adjudication of a RAND royalty rate and range. Moreover, the  
16 nature of Motorola's 802.11 and H.264 standard essential patent portfolios also heightens  
17 the importance of public access. As explained in previous orders, Motorola has  
18 committed to license its patent portfolios on a world-wide basis on RAND terms,  
19 meaning that all persons who practice either the 802.11 or H.264 standard have an  
20 interest in the manner in which this court adjudicates a RAND royalty rate and range for  
21 Motorola's patents.

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1 In an effort to balance the competing interests implicated by Microsoft's relevant  
2 license agreements, the court will treat the admittance and related testimony of such  
3 agreements as follows. During witness testimony related to Microsoft's license  
4 agreements, the court will not broadcast the contents of the license agreements to the  
5 public through courtroom monitors open to public view. Witness testimony, however,  
6 will be heard in open court, and therefore, if a witness discloses pertinent terms, rates or  
7 payments, such information will necessarily be made public. Additionally, because the  
8 court strongly believes its final order, and rationale contained therein, must be publicly  
9 available, any license agreement relied upon by the court in determining a RAND royalty  
10 rate and range will also be made public. On the other hand, if a party declines to use an  
11 individual licensing agreement at trial, that license agreement need not be made publicly  
12 available. Consistent with the foregoing, the court provisionally seals all five licensing  
13 agreements at this time. The court grants Microsoft's motion to seal trial exhibits 2813,  
14 2828, 3076, 3077, and 3352.

15       **3. Strategic Product Planning Documents & Financial Information**

16       Microsoft moves to seal trial exhibits containing (1) strategic planning information  
17 and (2) financial information arguing similarly for both categories of documents that  
18 disclosure would cause competitive harm to Microsoft. In particular, with respect to  
19 strategic planning information, Microsoft seeks to seal information pertaining to product  
20 development plans and marketing strategies for its Xbox and Windows product lines.  
21 (Microsoft Mot. at 10.) Regarding financial information, Microsoft seeks to seal past  
22 sales and revenue data as well as future sales and revenue projections. (*Id.* at 14-15.)

1 Having examined the trial exhibits that Microsoft asserts should be sealed as either  
2 strategic planning information or financial information, the court finds that on their face,  
3 these exhibits contain information that generally fall into one of two categories: (1)  
4 information related to past business strategies and (2) information related to future  
5 business strategies. Here, the court is inclined to seal documents related to the latter but  
6 not the former. Nevertheless, the court is aware that past strategic plans and past  
7 financial data may meaningfully predict Microsoft's future business plans, such that  
8 public disclosure of such information may provide a competitive advantage to  
9 Microsoft's competitors. Thus, the court is mindful of the proprietary nature of all  
10 confidential financial and strategic planning information.

11 On the other hand, based on the record in this case, the court understands that the  
12 parties seek to introduce financial and strategic planning information in an effort to  
13 demonstrate the importance of Motorola's standard essential patent portfolio to  
14 Microsoft's business plans. Along these lines, Motorola may argue that because much of  
15 Microsoft's sales depends on the use of Motorola's standard essential patent portfolios,  
16 Microsoft would be willing to pay more for a license to those patents. Thus, like the  
17 license agreements, Microsoft's strategic planning and financial information pertain to  
18 the central issue to be decided at this trial. Accordingly, the court will treat financial and  
19 strategic planning information in the same manner in which it treats licensing  
20 agreements—the court will provisionally seal the information, but witness testimony will  
21 be in open court and exhibits that form the basis for any part of the court's order will be  
22 made public. For the time being, the court grants Microsoft's motion to seal trial exhibits

1 2125, 2138, 2353, 2366, 2371, 2372, 2376-2378, 2385, 2584, 2585, 2687, 2689, 2727,  
2 2730, 2737, 2749, 2908, 3179, 3180, 1188, 1189, 2464-2468, 2477-2485- 2692, 2740,  
3 2751, 3333.

4 **B. Motorola's Motion to Seal Trial Exhibits**

5 Similar to Microsoft's motion to seal, Motorola's motion to seal sets forth  
6 categories of information contained in anticipated trial exhibits that Motorola believes  
7 should remain sealed from public access. Specifically, Motorola's motion to seal asks  
8 the court to seal seven categories of information: (1) confidential patent license  
9 agreements; (2) information relating to past and projected revenue and sales; (3)  
10 confidential settlement negotiations; (4) prior sealed confidential testimony and reports  
11 from related actions; (5) non-party technical information; (6) confidential information  
12 contained in depositions of parties and non-parties; and (7) confidential information of  
13 testimony of both fact witnesses. (Motorola Mot. at 5.) Although Motorola provided the  
14 court with a list of trial exhibits that it seeks to seal, it did not provide the court with a  
15 copy of the actual exhibits until Friday, November 9, 2012.<sup>1</sup> With limited time to  
16 examine the actual exhibits Motorola seeks to seal, the court is unable to make a precise  
17 ruling on each of the exhibits. Thus, the court provides specific rulings on trial exhibits  
18 where possible; and, where not possible, the court provides guidance as to the categories  
19 of information Motorola seeks to seal.

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<sup>1</sup> Motorola's motion seeks to seal over 150 trial exhibits.

1       **1. Confidential Settlement Negotiations & Technical Product**  
2       **Specifications**

3       These two categories of information—confidential settlement negotiations and  
4       technical product specifications—are exactly the same as two of the categories Microsoft  
5       sought to seal in its motion. (*See supra* § III.A.1) Indeed, Motorola seeks to seal some of  
6       the same trial exhibits that Microsoft sought to seal in its motion. Having already  
7       determined these two categories contain sufficiently confidential information to outweigh  
8       the public’s interest in access to public records, Motorola will be permitted to seal  
9       information related to confidential settlement negotiations and technical product  
10      specifications. Accordingly, in addition to the exhibits already sealed under these two  
11      categories pursuant to Microsoft’s motion, the court seals trial exhibit 3343.<sup>2</sup>

12       **2. Confidential Patent License Agreements**

13       Motorola seeks to seal a number of licensing agreements concerning its standard  
14      essential patents and its standard essential patent portfolios, as well as licensing  
15      agreements between non-parties and patent pools. These licensing agreements are quite  
16      similar to the licensing agreements Microsoft moved to seal, and accordingly, the court’s  
17      rulings will be consistent. The court will provisionally seal the licensing agreements, but

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19       <sup>2</sup> The attached exhibit lists to Motorola’s motion to seal do not indicate the category of  
20      information that Motorola asserts corresponds to the individual exhibit. (*See Exhibit List A*  
21      (Dkt. # 495-1) & *Exhibit List B* (Dkt. # 495-2).) In ruling on individual exhibits, the court must  
22      rely solely on the individual exhibits listed in the body of Motorola’s motion to determine which  
exhibit corresponds to which category. Thus, the court cannot be certain that it is sealing every  
trial exhibit that Motorola contends should be sealed per category of information. Indeed,  
Motorola’s motion fails to list even any individual exhibits for certain categories. (*See generally*  
Motorola Mot.)

1 witness testimony related to these agreements will be heard in open court. Moreover,  
2 licensing agreements that form the basis for any part of the court's final order will be  
3 made public through that order. Accordingly, at this stage, the court grants Motorola's  
4 motion to seal trial exhibits 9, 13, 36, 37, 38, 2833, 2835, 2836, 2837, 2865-2869, and  
5 3162-3164.

6 **3. Past and Projected Revenue and Sales**

7 Motorola moves to seal trial exhibits containing past and projected revenue and  
8 sales information. Microsoft moved to seal similar information, and the court rulings will  
9 be the same. Consistent with the rationale set forth in ruling on Microsoft's motion to  
10 seal financial information (*supra* § III.A.3), the court will provisionally seal past and  
11 projected revenue and sales information, but related witness testimony will be in open  
12 court and exhibits that form the basis for any part of the court's order will be made  
13 public. Accordingly, the court grants Motorola's motion to seal trial exhibits 2454-2463,  
14 2469-2476-2730, 2756, 3169, and 3333.

15 **4. Remaining Categories**

16 Motorola also seeks to seal (1) prior sealed confidential testimony and reports  
17 from related actions; (2) confidential information contained in depositions of parties and  
18 non-parties; and (3) confidential information of testimony of both fact witnesses.  
19 Motorola's motion is vague as to specific exhibits or testimony it seeks to seal. At best,  
20 Motorola indicates that certain fact and expert witnesses may testify as to licensing  
21 agreements and sales and revenue. (See Motorola Mot. at 17-22.) These categories of  
22 information have already been discussed and the court will treat such information

1 consistently regardless of the source of the information. With respect to documents that  
2 have been sealed in related actions, the court cautions Motorola that any exhibit Motorola  
3 seeks to place under seal in this action will be examined anew. The court is confident  
4 that any trial exhibit Motorola may seek to seal pursuant to any of these remaining  
5 categories of information can be dealt with on a rolling basis during the 9:00 a.m. daily  
6 hearings discussed in the Conclusion section (*infra* § IV).

7 **C. Non-Party Motions to Seal**

8 In addition to Microsoft and Motorola, a number of non-parties to this case have  
9 also filed motions to seal. (See Dkt. ## 498, 502, 519, 522, 543, 555, and 562.) All of  
10 these non-party motions seek to seal the terms of licensing agreements entered into with  
11 Motorola, Microsoft, or other non-parties. The court has already explained the manner in  
12 which it will admit such licensing agreements into evidence and hear testimony relevant  
13 to such agreements. Accordingly, consistent with this order, the court grants in part and  
14 denies in part the non-party motions to seal.

15 **IV. CONCLUSION**

16 Based on the foregoing, the court GRANTS in part and DENIES in part  
17 Microsoft's motion to seal trial exhibits (Dkt. # 510) and Motorola's motion to seal trial  
18 exhibits (Dkt. #495). The court also GRANTS in part and DENIES in part all of the non-  
19 party motions to seal (Dkt. ## 498, 502, 519, 522, 543, 555, and 562), which all relate to  
20 terms of licensing agreements. Two non-party motions to seal were also filed in a related  
21 case, C10-0343JLR, as docket numbers 103 and 114. These motions are identical to non-  
22 party motions filed in this case, which have now been ruled on. Thus, the court

1 STRIKES the motions (C10-0343JLR (Dkt. ## 103, 114)) from that docket as moot.

2 The court ORDERS sealed trial exhibits 9, 13, 36, 38, 84, 288, 524, 504, 541, 542,  
3 1476, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2813, 2828, 2833, 2835, 2836,  
4 2837, 2865-2869, 3076, 3077, 3162-3164, 3343, and 3352. The court also ORDERS  
5 sealed trial exhibits 2125, 2138, 2353, 2366, 2371, 2372, 2376-2378, 2385, 2584, 2585,  
6 2687, 2689, 2727, 2730, 2737, 2749, 2908, 3179, 3180, 1188, 1189, 2464-2468, 2477-  
7 2485- 2692, 2740, 2751, 3333. Finally, the court ORDERS sealed trial exhibits 2454-  
8 2463, 2469-2476, 2756, 3169, and 3333.

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1 For all other trial exhibits referenced by either Microsoft's or Motorola's motion,  
2 the court is unable to provide a ruling at this time. The court ORDERS at least one  
3 representative from Microsoft and Motorola to appear at **9:00 a.m. on each morning of**  
4 **trial**, including Tuesday, November 13, 2012, to discuss trial exhibits that the parties  
5 anticipate using that day for which a party seeks to seal information. Rulings at the 9:00  
6 a.m. hearings will be consistent with the guidelines provided in this order. Moreover, for  
7 *any* exhibit that a party seeks to seal, it must provide a redacted version for admission at  
8 trial removing from public view only the portions asserted to contain confidential  
9 information.<sup>3</sup> During these 9:00 a.m. hearings, the courtroom will be closed to  
10 unauthorized persons.

11 Dated this 12th day of November, 2012.

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15 JAMES L. ROBART  
United States District Judge

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22 <sup>3</sup> From a cursory review of the trial exhibits the parties seek to seal, it is clear that the  
parties have been overinclusive in the materials sought sealed.

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